Ross Stores, Inc. *and* Rachel Goss. Cases 31–CA–109296 and 31–CA–114107

December 23, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On October 21, 2014, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief, to which the General Counsel filed an answering brief and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, to which the Respondent filed an answering brief and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found, applying the Board's decision in *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), that the Respondent violated Section 8(a)(1) of the Act by maintaining an Arbitration Policy (Policy) and a Dispute Resolution Agreement (Agreement) that require employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.

In *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), enf. denied in relevant part __ F.3d __ (5th Cir. Oct. 26, 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra. Based on the judge's application of *D. R. Horton*, and on our subsequent decision in *Murphy Oil*, we affirm the judge's findings and conclusions as to the maintenance allegations.[1]

The judge dismissed the complaint allegation that the Respondent violated Section 8(a)(1) by enforcing its unlawful Policy. The judge found that the enforcement allegation was time barred by Section 10(b) because certain of the Respondent's enforcement actions, namely the Respondent's motion to compel individual arbitration and its decision to appeal the Superior Court's dismissal of its motion, both occurred before January 16, 2013, outside the 10(b) period. Contrary to the judge, we conclude that dismissal of this complaint allegation is not warranted. First, we find that the enforcement allegation is timely. Although the Respondent initiated its effort to enforce the Policy outside the 10(b) period, it continued to litigate the motion to compel individual arbitration during the relevant 6-month period before the charge was filed and served, and the Respondent obtained enforcement of the Policy from the court of appeals on October 31, 2013, more than 4 months after the charge was filed. See *Associated Builders & Contractors, Inc.*, 331 NLRB 132, 134 (2000) (allegation regarding failure to withdraw ongoing, unlawful enforcement litigation was timely, even though "the lawsuit was filed substantially more than six months before the filing of the charge" and "no actions were undertaken by [the Respondent] in furtherance of its lawsuit during the 6-month period preceding the filing of the instant charge"). Second, having found the allegation is not time barred, we further find that a

[1] The Respondent argues that the maintenance allegation in the complaint is time barred by Sec. 10(b) because the initial unfair labor practice charge was filed and served more than 6 months after the Charging Party, Rachel Goss, signed and became subject to the Policy. We reject this argument, as did the judge, because the Respondent continued to maintain the unlawful Policy during the 6-month period preceding the filing of the initial charge. The Board has long held under these circumstances that maintenance of an unlawful workplace rule, such as the Respondent's Policy, constitutes a continuing violation that is not time-barred by Sec. 10(b). See *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 & fn. 6 (2015); and *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 & fn. 7 (2015).

The Respondent argues that its Policy includes an exemption allowing employees to file charges with administrative agencies, including with the Board, and thus does not, as in *D. R. Horton,* unlawfully prohibit them from collectively pursuing litigation of employment claims in all forums. We reject the Respondent's argument for the reasons set forth in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

The Respondent contends that its Dispute Resolution Agreement (Agreement) is voluntary and therefore does not fall within the proscriptions of *Murphy Oil* and *D. R. Horton*, supra, which involved agreements that were imposed on employees as a condition of employment. See *D. R. Horton*, slip op. at 13 fn. 28. The Board has rejected this argument, holding that an arbitration agreement that precludes collective action in all forums is unlawful even if entered into voluntarily because it requires employees to prospectively waive their Sec. 7 right to engage in concerted activity. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 5–8 (2015). For this reason, we also disagree with our dissenting colleague's view that "the legality of a class-waiver agreement is even more self-evident when the agreement contains an opt-in provision." As we explained in *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 (2015), finding the Agreement unlawful, even with such a provision, does not run afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, supra, slip op. at 18; *Bristol Farms*, supra, slip op. at 2. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, slip op. at 17–18; *Bristol Farms*, slip op. at 2. As we held in *Bristol Farms*, slip op. at 2, "agreements in which individual employees purport to give up the statutory right to act concertedly for their mutual aid or protection are void."

violation is warranted on the merits, as it is well established that an employer's enforcement of an unlawful rule, like the Policy here, independently violates Section 8(a)(1). See *Murphy Oil*, supra, slip op. at 19–21. Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(1) of the Act by enforcing its unlawful Policy, which requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.[2]

AMENDED CONCLUSIONS OF LAW

Substitute the following as Conclusion of Law 2.

"2. Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an Arbitration Policy that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial."

AMENDED REMEDY

In addition to the remedies ordered by the judge, we find that companywide notice posting is appropriate because the record shows that the Respondent required all new hires to execute an acknowledgment of the unlawful Arbitration Policy as part of its onboarding process. "[W]e have consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect." *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 7 (2011) (quoting *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007)). As the D.C. Circuit observed, "only a company-wide remedy extending as far as the company-wide violation can remedy the damage." *Guardsmark, LLC,* 475 F.3d at 381. Accordingly, we shall order that the Respondent post a notice at all locations where the Policy was in effect.

Consistent with our decision in *Murphy Oil*, supra, slip op. at 21, we shall also order the Respondent to reimburse Charging Party Rachel Goss and any other plaintiffs for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion in Superior Court to compel individual arbitration of the class claims.[3] See *Bill Johnson's Restaurants v. NLRB*, 461 U. S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). See *Teamsters Local 776 (Rite Aid*), 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses"), enfd. 973 F.2d 230 (3d Cir. 1992).

We shall also amend the judge's remedy to order the Respondent to notify the court of appeals that it has rescinded or revised the Arbitration Policy and to inform the court that it no longer opposes Rachel Goss's class lawsuit on the basis of the Policy.

ORDER

The National Labor Relations Board orders that the Respondent, Ross Stores, Inc., Thousand Oaks, California, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Maintaining and/or enforcing a mandatory Arbitration Policy that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) Maintaining a mandatory Dispute Resolution Agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Arbitration Policy and the Dispute Resolution Agreement in all of their forms, or revise

[2] Our dissenting colleague observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, supra, slip op. at 2 and *Bristol Farms*, supra, slip op. at 2 and fn. 2. But what our colleague ignores is that the Act does "create[] a right to *pursue* joint, class, or collective claims if and as available without the interference of an employer-imposed restraint." *Murphy Oil*, supra, slip op. at 2. The Respondent's Policy is just such an unlawful restraint.

[3] We reject our dissenting colleague's view that the Respondent's motion to compel arbitration was protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), the Court identified two situations in which a lawsuit enjoys no such protection: where the action is beyond a State court's jurisdiction because of Federal preemption, and where "a suit . . . has an objective that is illegal under federal law." 461 U.S. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts such as the Respondent's motion to compel arbitration that have the illegal objective of limiting employees' Sec. 7 rights and enforcing an unlawful contractual provision, even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil*, supra, slip op. at 20–21; *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

them in all of their forms to make clear to employees that the Arbitration Policy and the Dispute Resolution Agreement do not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the unlawful Arbitration Policy and Dispute Resolution Agreement that they have been rescinded or revised and, if revised, provide them a copy of the revised Arbitration Policy and Dispute Resolution Agreement.

(c) Notify the Court of Appeals of the State of California, First Appellate Division, District One, in Case RG11577328, that it has rescinded or revised the Arbitration Policy upon which it based its motion to stay Rachel Goss's class lawsuit and to compel individual arbitration of her claims, and inform the court that it no longer opposes the lawsuit on the basis of the Policy.

(d) In the manner set forth in this decision, reimburse Rachel Goss and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion to stay the class lawsuit and compel individual arbitration.

(e) Within 14 days after service by the Region, post at its Thousand Oaks, California facility copies of the attached notice marked "Appendix A," and at all other facilities where the unlawful Arbitration Policy and Dispute Resolution Agreement are or have been in effect, copies of the attached notice marked "Appendix B."[4] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current employees and former employees employed by the Respondent at any time since January 16, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 31 sworn certifications of responsible officials on forms provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 23, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues find that the Respondent's Arbitration Policy and its Dispute Resolution Agreement both violate Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because they waive the right to participate in class or collective actions regarding non-NLRA employment claims. Charging Party Rachel Goss signed the Policy, and later she filed a class action lawsuit against the Respondent in California Superior Court alleging violations of the California Labor Code. On August 18, 2011, in reliance on the Policy, the Respondent filed a motion to compel individual arbitration. The motion was denied, and the Respondent appealed the order denying its motion on December 14, 2011. On October 31, 2013, the California Court of Appeals reversed the Superior Court's order. My colleagues find that the Respondent unlawfully enforced its Arbitration Policy. I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[1]

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[2] How-

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, No. 14–60800, 2015 WL 6457613 (5th Cir. 2015).

[2] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of

ever, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[3] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[4] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class waiver agreements;[5] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[6]

Further, the Dispute Resolution Agreement offered each employee the option to either accept its terms by clicking an "I Agree" button at the end of the online form or decline its terms by exiting the program. For the reasons stated in my dissenting opinion in *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 (2015), the legality of a class-waiver agreement is even more self-evident when the agreement contains an opt-in provision, based on every employee's 9(a) right to present and adjust grievances on an "individual" basis and each employee's Section 7 right to "refrain from" engaging in protected concerted activities.

Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.[7]

Because I believe the Respondent's Arbitration Policy was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in State court seeking to enforce the Policy.[8] It is relevant that the State appellate court that had jurisdiction over the non-NLRA claims *granted* the Respondent's motion to compel arbitration. That the Respondent's motion was reasonably based is also supported by the multitude of

Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu,* 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

[3] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[4] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12–60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[5] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil USA, Inc. v. NLRB*, above; *D. R. Horton, Inc. v. NLRB,* above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil,* 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co.*, No. 14-CV-5882 (VEC), 2015 WL 1433219 (S.D.N.Y. Mar. 27, 2015); *Nanavati v. Adecco USA, Inc.,* No. 14-CV-04145-BLF, 2015 WL 1738152 (N.D. Cal. Apr. 13, 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services,* No. 1:12-CV-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

[6] Even if a conflict existed between the NLRA and an arbitration agreement's class waiver provisions, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil,* above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

[7] Because I disagree with the Board's decisions in *Murphy Oil,* above, and *D. R. Horton, Inc.,* 357 NLRB No. 184 (2012), enf. denied in pert. part 737 F.3d 344, 362 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they "leave[] open a judicial forum for class and collective claims," *D. R. Horton*, 357 NLRB No. 184, slip op. at 12, by permitting the filing of complaints with administrative agencies that, in turn, may file class or collective action lawsuits. See *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013).

[8] There is no allegation that the Respondent enforced the Dispute Resolution Agreement.

court decisions that have enforced similar agreements.[9] As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D .R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[10] I also believe that any Board finding of a violation based on the Respondent's meritorious state court motion to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB,* 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil,* above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the Charging Party and any other plaintiffs for their attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. December 23, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce a mandatory Arbitration Policy or maintain a mandatory Dispute Resolution Agreement that require our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawful Arbitration Policy and Dispute Resolution Agreement in all of their forms, or revise them in all of their forms to make clear that the Arbitration Policy and Dispute Resolution Agreement do not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory Arbitration Policy and Dispute Resolution Agreement in all of their forms that the Arbitration Policy and Dispute Resolution Agreement have been rescinded or revised and, if revised, WE WILL provide them a copy of the revised Arbitration Policy and Dispute Resolution Agreement.

WE WILL notify the court in which Rachel Goss filed her class lawsuit that we have rescinded or revised the Arbitration Policy upon which we based our motion to stay her class lawsuit and compel individual arbitration, and WE WILL inform the court that we no longer oppose Goss' class lawsuit on the basis of that Policy.

WE WILL reimburse Rachel Goss and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to stay her class lawsuit and compel individual arbitration.

ROSS STORES, INC.

The Board's decision can be found at www.nlrb.gov/case/31-CA-109296 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[9] See, e.g., *Murphy Oil, Inc., USA v. NLRB*, above; *Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

[10] *Murphy Oil USA, Inc. v. NLRB*, above, at fn. 6.

APPENDIX B

NOTICE TO EMPLOYEES
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An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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Choose representatives to bargain with us on your behalf

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Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce a mandatory Arbitration Policy or maintain a mandatory Dispute Resolution Agreement that require our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawful Arbitration Policy and Dispute Resolution Agreement in all of their forms, or revise them in all of their forms to make clear that the Arbitration Policy and Dispute Resolution Agreement do not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory Arbitration Policy and Dispute Resolution Agreement in all of their forms that the Arbitration Policy and Dispute Resolution Agreement have been rescinded or revised and, if revised, WE WILL provide them a copy of the revised Arbitration Policy and Dispute Resolution Agreement.

ROSS STORES, INC.

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J. Carlos Gonzalez, Esq., for the General Counsel.
Gregory D. Wolflick Esq. (Wolflick & Simpson), for the Respondent.
Matthew Righetti, Esq. (Righetti & Glugoski), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: This case came before me based on a stipulated record dated July 21, 2014, whereby the parties waived a hearing. On July 16, 2013, Rachel Goss (Goss) filed the charge in Case 31–CA–109296 against Ross Stores, Inc. (Respondent or the Employer). On February 27, 2014, Goss filed an amended charge against Respondent. On September 27, 2013, Goss filed the charge in Case 31–CA–114107. On February 28, 2014, the Regional Director for Region 31 of the National Labor Relations Board (the Board) issued a complaint against Respondent. The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer in which it denied that it had violated the Act.

The parties have been afforded full opportunity to appear, and to file briefs. Upon the entire record, and having considered the briefs submitted by the parties, I make the following

FINDINGS OF FACT

At all times material, Respondent, a corporation with a principal place of business in Thousand Oaks, California, has been engaged in the retail sale of clothing and related products. Respondent, in conducting its business operations described above, during 12 months prior to the issuance of the complaint, derived gross revenues in excess of $500,000. Respondent purchased and received goods at its facilities in California valued in excess of $5000 directly from sources outside the State of California. Accordingly, the parties stipulated and I find, Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

At all times material, Respondent, a corporation with a principal place of business in Thousand Oaks, California, has been engaged in the retail sale of clothing and related products. Respondent, in conducting its business operations described

above, during 12 months prior to the issuance of the complaint, derived gross revenues in excess of $500,000. Respondent purchased and received goods at its facilities in California valued in excess of $5000 directly from sources outside the State of California. Accordingly, the parties stipulated and I find, Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

Specifically, the complaint alleges that Respondent interfered with, restrained, and coerced employees in the exercise of their Section 7 activities by maintaining and enforcing several employment policies as set forth below. Since at least May 4, 2010, and at all material times, Respondent has maintained a provision titled "Arbitration Policy" in its Store Associate Handbook.

About May 4, 2010, Respondent had Goss sign a "Store Associates Handbook Acknowledgement and Agreement" which, when executed, required Goss to "agree to utilize, comply with, and be bound to" Respondent's Arbitration Policy described above.

Since at least August 18, 2011, Respondent has enforced its Arbitration Policy and Store Associates Handbook Acknowledgement and Agreement described above by asserting them in litigation brought against Respondent by Charging Party Rachel Goss in *Rachel Goss, individually and on behalf of all others similarly situated v. Ross Stores, Inc., Ross Dress For Less, Inc., and Does 1 through 50, inclusive,* Case RG11577328 (Class Action Complaint) tiled in Superior Court of the State of California, County of Alameda (Superior Court).

About August 18, 2011, Respondent filed in Superior Court a motion to compel individual arbitration of Goss' claims against Respondent alleged in the Class Action Complaint and filed the Declaration of Respondent's manager, corporate paralegal, Jeff Cook in support of the motion to compel individual arbitration. About October 26, 2011, the Superior Court issued an order denying Respondent's motion to compel the Charging Party to individual arbitration. About December 14, 2011, Respondent appealed the Superior Court's denial of the motion to compel individual arbitration.

About October 31, 2013, the Court of Appeals of the State of California, First Appellate District, Division One (Court of Appeals) reversed the Superior Court's order denying Respondent's motion to compel individual arbitration.

Since at least June 13, 2011, and at all material times, Respondent has maintained a provision titled, "Dispute Resolution Agreement" requiring employees who agree to comply and be bound to it to individually arbitrate all employment-related claims, including claims arising under Federal statutes.

Since June 13, 2011, Respondent has required all current and new store employees to review the Dispute Resolution Agreement by logging into Respondent's electronic program with an employee-specific password. Respondent's electronic program is used by employees to receive training and to acknowledge receipt of Respondent's new policies, procedures, and handbooks.

After presenting employees with the terms of the Dispute Resolution Agreement, the electronic program takes employees to an electronic signature page which prompts employees to either accept the terms of the Dispute Resolution Agreement by clicking an "I Agree" button or decline the terms of the Dispute Resolution Agreement by exiting the electronic program.

Statement of the Issues

Based on the foregoing factual stipulations, the Parties agree that the legal issues to be resolved in this matter are the following:

(1) Whether Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing its Arbitration Policy which requires employees to resolve all employment-related disputes through individual arbitration.

(2) Whether Respondent violated Section 8(a)(1) of the Act by maintaining its Dispute Resolution Agreement which requires employees who accept to be bound by the Dispute Resolution Agreement to resolve all employment-related disputes through individual arbitration.

Position of the Parties

The General Counsel and Charging Party argue that the Respondent's "Arbitration Policy" in its Store Associate Handbook is unlawful on its face and violates Section 8(a)(1) of the Act. In *D. R. Horton, Inc.,* 357 NLRB No. 184 (2012), the legal framework for considering the legality of employers' arbitration agreements that limit collective and class legal activity in judicial and arbitral forums was addressed by the Board. The Board held that a policy or agreement precluding employees from filing employment-related collective or class claims in both judicial and arbitral forums violates Section 8(a)(l) of the Act because this type of agreement restricts employees' Section 7 right to engage in concerted action for mutual aid or protection.

The Respondent argues Section 10(b) of the Act requires that a charge be filed within 6 months of the alleged incident giving rise to the violation of the Act. The Board does not have jurisdiction to issue a complaint based on conduct occurring more than 6 months before the filing and service of the charge. *Media General Operations, Inc.,* 346 NLRB 74 (2005).

Respondent further argues that even assuming that the 10(b) period somehow did not run until Respondent filed its Motion to Compel Arbitration on August 8, 2011, the Charging Party would have been required to file her charge on or before February 9, 2012. Even under this measure, the instant charge is more than 18 months beyond the 10(b) period. As a result, the Board has neither authority nor jurisdiction to issue the complaint in the instant matter.

Additionally, Respondent argues that the Board's continued reliance on *D. R. Horton, Inc.* is inappropriate.

Conclusions

1. Section 10(b)

Section 10(b) of the Act requires that a charge be filed within 6 months of the alleged incident giving rise to a violation of the Act. A complaint may not issue based upon conduct occurring more than 6 months before the filing and service of the charge. *Media General Operations, Inc.,* 346 NLRB 74 (2005).

Here the charge was not filed until July 16, 2013. Thus, I can only consider matters after January 16, 2013. Thus, the allegation that Goss signed the agreement to arbitrate is time barred. The allegation that Respondent filed a court action to

compel arbitration is time barred. The allegation that Respondent appealed the court's dismissal of its action to compel arbitration is time barred. The only allegations which are not time-barred are the maintenance of the Arbitration Agreement and the maintenance of the Dispute Resolution Agreement, since January 16, 2013.

2. The Arbitration Policy

The Arbitration Policy (Policy) "applies to any disputes arising out of or relating to the employment relationship, between an associate and Ross [. . . .] This policy requires that all such disputes be resolved only by an Arbitrator through final and binding arbitration."

Further, the Policy states "The parties will have the right to conduct civil discovery and bring motions, as provided by the Federal Rules of Civil Procedure and enforced by the Arbitrator. However, there will be no right or authority for any dispute to be brought, heard or arbitrated as a class action, private attorney general, or in a representative capacity on behalf of any person."

In *D. R. Horton, Inc.,*357 NLRB No. 184 (2012), the Board held that a policy or agreement precluding employees from filing employment-related collective or class claims in both judicial and arbitral forums violates Section 8(a)(1) of the Act because this type of agreement restricts employees' Section 7 right to engage in concerted action for mutual aid or protection. It is undisputed that the Arbitration Policy prohibits class actions in both judicial and arbitral forums. Respondent required employees to agree to the Arbitration Policy as a condition of employment. Accordingly, I find that Respondent's maintenance of the Arbitration Policy violates Section 8(a)(1) of the Act as set forth in *D. R. Horton, Inc.,* supra.

3. The Dispute Resolution Agreement

Respondent has required employees to review the Dispute Resolution Agreement by logging into Respondent's electronic program. The Dispute Resolution Agreement requires employees who agree to comply and be bound to individually arbitrate all employment-related claims. The Dispute Resolution Agreement "sets forth the procedures that you and Ross mutually agree must be used to resolve disputes arising out or relate to your employment with Ross or its termination. Disputes subject to this Agreement will be resolved by mediation or final and binding arbitration and not by a court or jury. "

The Agreement further states, "In arbitration, all parties will have the right to conduct discovery and bring motions as provided by the Federal Rules of Civil procedure. There will be, however, no right or authority for any dispute to be brought or arbitrated as a class action."

In *D. R. Horton, Inc.,* 357 NLRB No. 184 (2012), the Board held that a policy or agreement precluding employees from filing employment-related collective or class claims in both judicial and arbitral forums violates Section 8(a)(1) of the Act because this type of agreement restricts employees' Section 7 right to engage in concerted action for mutual aid or protection.

This Agreement, for employees who agree to sign it, prohibits employees from bringing forth claims against Respondent in a concerted manner. Accordingly, I find that Respondent's maintenance of the Dispute Resolution Agreement violates Section 8(a)(1) of the Act as set forth in *D. R. Horton, Inc.,* supra.

Respondent argues that that the *D. R. Horton, Inc.* case became invalid as result of the United States Supreme Court holding in *Noel Canning v. NLRB,* 134 S.Ct. 2550 (2014). However, the *D. R. Horton, Inc.* decision was not affected by the *Noel Canning* decision. *D. R. Horton, Inc.* was issued by a Board consisting of Chairman Mark Pearce and Board Members Craig Becker and Brian Hayes. In *Noel Canning,* the Supreme Court held that the appointment of Members Terence Flynn, Sharon Block, and Richard Griffin were unconstitutional. The Supreme Court did not find that the appointments of Pearce, Becker, or Hayes were unconstitutional. Thus, *D. R. Horton, Inc.,* continues to be binding Board precedent.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by maintaining an Arbitration Agreement which waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

3. Respondent violated Section 8(a)(1) of the Act by maintaining a Dispute Resolution Agreement which waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, Ross Stores, Inc. in Thousand Oaks, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining its Arbitration Agreement to the extent that Agreement prohibits employees from filing collective or class action lawsuits or arbitrations.

(b) Maintaining its Dispute Resolution Agreement to the extent that Agreement prohibits employees from filing collective or class action lawsuits or arbitrations

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the prohibition of collective or class action lawsuits and arbitrations from its Arbitration Agreement

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and Dispute Resolution Agreement.

(b) Within 14 days after service by the Region, post at its facility in Thousand Oaks, California, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 16, 2013.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 21, 2014

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain with us on your behalf.

Act together with other employees for your benefit and protection.

Choose not to engage in any of these protected activities.

WE WILL NOT prohibit you from filing collective or class action lawsuits or arbitrations in concert with your fellow employees.

WE WILL NOT maintain and enforce our Arbitration Agreement or Dispute Resolution Agreement to the extent that they prohibit employees from filing collective or class action lawsuits or arbitrations.

WE WILL rescind or revise the prohibition of filing collective or class action lawsuits and arbitrations from our Arbitration Agreement and Dispute Resolution Agreement.

ROSS STORES, INC.